IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1977

No. 77-304

Paul Richter, dba The Body Shop,

Petitioners,

vs.

Baxter Rice, Director of The Department of Alcoholic Beverage Control of the State of California, The Department of Alcoholic Beverage Control of the State of California, and The Alcoholic Beverage Control Appeals Board of the State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI TO THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

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Petitioner Paul Richter prays that a Writ of Certiorari issue to review the judgment and opinion of the Alcoholic Beverage Control Appeals Board, entered April 29, 1977, affirming the decision of the Department of Alcoholic Beverage Control of the State of California to revoke Petitioner's general on-sale license to sell alcoholic beverages.

OPINION BELOW

The opinion of the Alcoholic Beverage Control Appeals Board is unreported and appears in Appendix "A" hereto. The orders of the Court of Appeal of the State of California, Fourth Appellate District, and of the California Supreme Court denying writs of review of said opinion were entered on May 26, 1977 and June 23, 1977, respectively, and appear herein as Appendices "B" and "C" respectively.

APPENDIX TO THIS PETITION

Because of the volume of Appendix "D", consisting of the expert testimony of Ms. Virginia Francis Chase, which testimony was incorporated into and part of the administrative record below (See Appendix "A", at Page 6 thereof), the Appendix has been presented

separately from this Petition, pursuant to Supreme Court Rule 23(i).

PROCEEDINGS BELOW

On or about March 18, 1976, an accusation was filed by Respondent, Department of Alcoholic Beverage Control (hereinafter "Department") alleging that grounds for discipline against Petitioner's license existed under Article XX, §22 of the California Constitution and under §24200 of the California Business and Professions Code in that Petitioner allegedly permitted violations of the Department's Rule 143.3.

A hearing was duly held in said matter and a proposed decision was duly rendered and thereafter adopted by the Respondent Department in said matter in which your Petitioner's license was revoked as aforesaid. Said matter was then duly appealed to Respondent Alcoholic Beverage Control Appeals Board (hereinafter "Board") which thereafter rendered its decision as aforesaid which was filed on or about

April 29, 1977. Appendix "A".

Petitioner duly petitioned the Court of Appeal of the State of California, Fourth Appellate District for a Writ of Review and Stay Order, as prayed for herein. Said Court summarily denied said petition on May 26, 1977 without any hearing. Appendix "B". Thereafter, Petitioner duly petitioned the Supreme Court of the State of California for a hearing and/or Writ of Review and Stay Order. Said Court also summarily denied said petition without hearing on June 23, 1977. Appendix "C".

JURISDICTION

The date of the judgment sought to be reviewed is June 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I

CAN A STATE ALCOHOLIC BEVERAGE LICENSING AGENCY PROHIBIT A LICENSEE FROM

OFFERING LIVE ENTERTAINMENT CONSISTING OF SCANTILY CLAD AND/OR NUDE MODERN DANCE PERFORMANCES WHERE IT IS UNCONTESTED ON THE RECORD THAT THE PERFORMANCES CONSTITUTE EXPRESSIVE ENTERTAINMENT PRESUMPTIVELY PROTECTED BY THE FIRST AMENDMENT AND UTTERLY LACKING ANY ELEMENTS OF "GROSS SEXUALITY" AND/OR "INCIDENTS OF A BACCHANALIAN REVELRY" AMOUNTING TO A PUBLIC NUISANCE?

II

CAN A STATE ALCOHOLIC BEVERAGE LICENSING AGENCY APPLY A RULE PROHIBITING NUDE ENTERTAINMENT AT LICENSED PREMISES WITHOUT REGARD TO THE CONSTITUTIONAL CONTEXT AND CHARACTER OF THE PERFORMANCES TO WHICH SAID RULE IS APPLIED?

III

CAN A STATE ADMINISTRATIVE AGENCY DISCIPLINE A LICENSEE FOR CONDUCT PRE-

SUMPTIVELY PROTECTED BY THE FIRST AMENDMENT WHERE NO PROVISION EXISTS UNDER STATE LAW FOR A PROMPT JUDICIAL HEARING, OR ANY JUDICIAL HEARING AS A MATTER OF RIGHT, ON THE ISSUE OF THE FIRST AMENDMENT PROTECTION OF THE CONDUCT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment (and to the extent the First Amendment applies to the States, the Fourteenth Amendment) to the United States Constitution, California Department of Alcoholic Beverage Control Rule 143.3, and California Business and Professions Code §§23089, 23090 and 23090.5.

First Amendment:

> "Congress shall make no law -- abrdiging the freedom on speech, ..."

Fourteenth Amendment:

> "Section 1 ... No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. ..."

Department Rule 143.3:

Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at the premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals.

"(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

"No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

"No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus.

"If any provision of this rule or the application thereof to any person or

circumstances is held invalid, such invalidity shall not affect other provisions or application of the rule which can be given effect without the invalid provision or application, and to this end the provisions and this rule are severable."

California Business and Professions Code §23089:

"Final orders of the board may be reviewed by the courts specified in Article 5 (commincing with Section 23090) of this chapter within the time and in the manner therein specified and not otherwise."

California Business and Professions Code §23090:

"Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. The

application for writ of review shall be made within 30 days after filing of the final order of the board."

California Business and Professions Code §23090.5:

"No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case."

STATEMENT OF THE CASE

This is a petition which seeks review of the aforesaid revocation of Petitioenr's license to sell alcoholic beverages for

violation of the Department's Rule 143.3 proscribing nude dancing in Petitioner's "neighborhood theatre." Petitioner's theatre is in a proper local zone and his performances are not prohibited by any local or state penal law. The accusation and disciplinary action imposed herein is based uponthe mere presentation of scantily clad and/or nude modern dance performances on a raised stage in the licensed premises. No finding was made that any of the instances of scantily clad and/or nude dancing found to have occurred in Petitioner's premises were in any way obscene or "grossly sexual" or disturbing to the community citizenry. Additionally, at no time during said dance performances was there any contact whatsoever between any patron and any performer, no profane remarks or suggestions were made by patrons to the dancers during performances nor did any disturbances result from said performances. The dancers were scantily clad and/or nude only during their dance performances in the theatre

on the fixed, raised stage which was adequately separated from all patrons, which was in an establishment with fixed theatre style seats so arranged that a body of spectators had an unobstructed view of the stage upon which movable scenery was used and theatrical performances were given.

That the aforesaid nude dance presentations occurred in Petitioner's premises as described is as uncontested by Respondent as it is totally unrebutted on the record that said dance performances constituted "communicative expression" rather than "gross sexuality," "hardcore pornography" or a "bacchanalian revelry" and that such occurred in a theatre or similar establishment. (See testimony of theatre arts expert witness Ms. Virginia Chase, Appendix "D", at pp. 100, 125, 144, 150 and 159.) Thus, Petitioner contends herein, before Respondent administrative bodies as he did, that Rule 143.3 is unconstitutional as applied to

the specific dance performances herein in that such application is violative of the First and Fourteenth Amendments of the United States Constitution.

REASONS FOR GRANTING THE WRIT

A. Rule 143.3 Is Violative Of The First Amendment As Applied To The Specific Dance Performances Herein In That The Conduct At Issue Does Not Fall Within The Range Of "Gross Sexuality" That Can Be Constitutionally Prohibited Thereby.

That nude dancing is protected by the First Amendment is not subject to doubt. Salem Inn, Inc., et al. vs. Frank, 501 F.2d 18, 20-21, (2d Cir. 1974), Affirmed Sub. Nom. Doran vs. Salem, Inn, 95 S.Ct. 2561 (1975), California vs. LaRue, 409 U.S. 108, 118 (1972), Atwood vs. Purcel, 402 F.Supp. 231, 234 (D. Az. 1975). In LaRue, this Court considered the scope of the Department's Rule 143.3 and without any particularized facts held that notwithstanding

the Rule's broad sweep of protected expression within its terms, the Department's Rule would be upheld as a facially valid exercise of the Department's regulatory power. The Court carefully limited the scope of its holding by recognizing that "that specific future applicatio of [the Rule] may engender concrete problems of constitutional dimension... . We deal here only with the statute on its face." 409 U.S. at 119, Note 5.

Thus, the LaRue decision stands only for the validity of the Rule on its fact, apart from and without reference to any particular factual context. Indeed, Justice Douglas dissent admonished the Court that it should reserve decision on the constitutionality of the Rule until the State Board gave the "generalized provisions of the Rules ... particularized meaning" 409 U.S. at 123. The instant case raises the critical issue left unresolved by the LaRue coourt: Whether Rule 143.3 can be applied indiscriminately to specific dance

performances presented within a factual context that is neither lewd nor grossly sexual nor in any way a public nuisance. Notwithstanding the limiting language of LaRue, the Respondent Department maintains that LaRue somehow sanctione the pro tanto repeal of the First Amendment as to any and all dancing literally falling within the rule's language. In the years since the LaRue decision, the lower federal courts have rejected this simplistic interpretation. In Escheat, Inc. vs. Pierstorff, 354 F.Supp. 1121 (W.D. Dis. 1973), the district court undertook to assess the constitutional status of nude dancing in the wake of LaRue:

> "A preliminary issue is whether, in the aftermath of LaRue, supra, any activity taking place within a licensed tavern can be protected by the First Amendment ... . Although the [LaRue] majority does not face the question directly, it implies that not all performances of this genre may constitutionally be prohibited in bars:

> "... we would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries which the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater."
>
> "... I conclude that some shows which fall somewhere between Mary Poppins, on the one hand, and 'Bacchanalian revelries,' on the other, even when performed in a bar, continue to be entitled to First Amendment protection."

In line with this analysis, it has been several times held that the LaRue decision sanctioned the exercise of the State's regulatory power over liquor sales only in the very limited area where the dance performances "partake more

of gross sexuality than of communication." Clark vs. City of Freemont, Nebraska, 377 F.Supp. 327, 341-42 (D. Neb. 1974), Peto vs. Cook, 364 F.Supp. 1, 3 (S.D. Ohio 1973), cert. den. 415 U.S. 93 (1973).

Petitioner contends as a factual matter that the particular dance performances offered by his establishment do not materially differ for First Amendment purposes from performances offered by a "scantily clad ballet troupe." With respect to the dance performances offered by Petitioner, the Respondent Department has never charged nor has any findings ever been made that the performances are "obscene," "gross sexual" or "akin to Bacchanalian revelry". Further, the Department has never alleged much less offered proof that with respect to any of the dance performances offered by Petitioner there has been any contact between patrons and any performer, nor that profane language has been used, nor that any disturbance involving the public morals has resulted from the Petitioner's

dance performances. Indeed, there would appear to be little factual dispute that the concrete dance performances offered by Petitioner are wholly artistic and expressive, in sharp contrast to the generalized reports of "grossly sexual" conduct which were before the LaRue Court in the abstract.

Whatever ambiguity may have been present as to the scope of the LaRue decision has been removed by this Court last term in the case of Craig vs. Boren, ___U.S.___, 97 S.Ct. 451 (1976). In that case, the Court, through Justice Brennan, expressly limited LaRue, holding that the State may discipline license holders on the basis of presumptively First Amendment activities only in the narrow area where the restricted conduct "partakes" more of gross sexuality than communication. Therein this Court rejected the contentions of the State that its powers to regulate the consumption of alcohol under the Twenty-First Amendment extended so far as to

it from the requirements of Equal Protection. The Court noted that while the Twenty-First Amendment has been deemed to create a partial exception to the normal operation of the Commerce Clause restriction on state regulation,

> "Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-First Amendment to other constituional provisions becomes increasingly doubtful. ... Any departure from this historical view have been limited and sporadic."

97 S.Ct. at 461.

The Court went on to show that cases involving individual rights protected by the Due Process Caluse have been historically afforded close protection, notwithstanding the State's asserted interest in regulating the consumption of alcohol. 97 S.Ct. at 462. The Court then distinguished LaRue, stating as follows:

> "It is true that California v. LaRue ... relied upon the Twenty-First

> Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communiction.' ... Nevertheless, the Court has never recognized sufficient 'strength' in the amendment to defeat an otherwise established claim of invidious discrimination in the violation of the Equal Protection Clause. [Emphasis added.]

97 S. Ct. at 462.

Thus, under this Court's most recent analysis the LaRue decision must be deemed to be nothing more than a "limited and sporadic" departure from the historic position of the Supreme Court that the Twenty-First Amendment does not work a repeal of the First Amendment. Petitioner submits that the LaRue decision must be strictly construed as to its procedural and factual

posture. And it is most urgently submitted that the LaRue decision never reached the issue herein presented, whether the State can revoke Petitioner's license on the basis of dance performances acknowledged and admitted by the Respondent to be "expressive" in nature and not "partaking of gross sexuality."

It is respectfully submitted that the rationale of the LaRue decision as elucidated by subsequent authorities cited above prohibits application of Rule 143.3 to nude dance performances not partaking of gross sexuality. Accordingly, it is respectfully urged upon this Court that no disciplinary action can be based upon the mere proof of nude dancing absent specific findings that each such instance partook of "gross sexuality akin to a Bacchanalian revelry." Because no such findings were made herein, nor any evidence whatseover presented by Respondent to support such findings, the application of said Rule herein is beyond the limits set by this Court in LaRue.

B. The Administrative Disciplinary Scheme At Issue Violates Petitioner's Right To Due Process Under The Fourteenth Amendment.

It is further respectfully submitted that the administrative disciplinary scheme herein is violative of the First and Fourteenth Amendments in that no prompt judicial hearing is afforded prior to adverse administrative action against the licensee. For in Clark vs. City of Freemont, Nebraska, 377 F.Supp. 327 (D. Neb. 1974), the district court struck down a scheme of licensing similar to that herein and held that a judicial hearing is required to determine whether the conduct at issue falls within the "gross sexuality" concept of LaRue. If not, said conduct should not be the basis for adverse action against the licensee unless found to be obscene. 377 F.Supp. at 342.

When these principles are applied to the administrative scheme herein, the glaring deficiency thereof becomes self-evident. Under §23089 of the Business and Professions Code

of the State of California, final orders of the Respondent Department are to be reviewed only in the manner specified by Article 5 (commencing with §23090) of the Business and Professions Code. Under §23090.5 of the Business and Professions Code, no Court of the State has jurisdiction to "review, affirm, reverse, correct, or annul" any order, rule or decision, except that the Court of Appeal or the Supreme Court may hear appeals by way of discretionary writ. Such a statutory scheme operates flatly to deny your Petitioner any opportunity for a judicial hearing as a matter of right as to the "gross sexual" character of Petitioner's performances as required by Clark. The gravity of this denial of due process becomes sharpened in that it creates a "prior restraint" on Petitioner's exercise of First Amendment rights thereby "chilling" their exercise in a manner uniformly condemned by the Courts. Smith vs. California, 361 U.S. 147 (1959); Freedman v. Maryland, 380 U.S. 51

(1965); Clark v. City of Fremont, Nebraska, supra, 377 F.Supp. 327.

Rule 143.3 and §§23089 and 23090 of the Business and Professions Code combine to create a procedural scheme with no provision for judicial review of Department orders, except by a discretionary writ on appellate levels. It is manifest that this procedural insulation of Department action from full judicial review directly contravenes the constitutional principles articulated by Clark, supra.

CONCLUSION

In 1970 the Respondent Department promulgated certain rules respecting the presentation of nude entertainment in licensed premises. Without the benefit of any concrete factual evidence, and strictly on the record of administrative hearings, this Court upheld the facially validity of the Department's Rule 143.3. In doing so the Court acknowledged the very real possibility that the application of the

Department's Rule to particular factual situations could engender problems of constitutional dimension and expressly reserved opinion as to the permissible scope of the Rule's application. In the intervening years, a body of federal case law has grown to the effect that the LaRue decision is limited to sanctioning the application of rules such as the Department's Rule 143.3 to factual situations having the "grossly sexual" character of the conduct of which the Court was aware by reason of the record in the Department's hearings. Craig vs. Boren, ___U.S.___, 97 S.Ct. 451 (1976), Escheat, Inc. vs. Pierstorff, 354 F.Supp. 1120 (W.D. Wis. 1973), Clark vs. City of Fremont, Nebraska, 377 F.Supp. 327 (D. Neb. 1974) and Peto vs. Cook, 364 F.Supp. 1 (S.D. Ohio 1973) cert. den. 415 U.S. 93.

Petitioner contends that under these decisions the particular dance performances he offers do not fall within the limited set

of grossly sexual performances recognized by LaRue to be the proper subject of Department regulation.

As is manifest from the Department's Appeals Board decision, Appendix "C", the Respondent has choosen to ignore these holdings and instead to proceed with the enforcement of its Rule 143.3 as to protected expression falling outside the limits of the Rule's application. All state avenues having been exhausted, it is now incumbent upon this Court to instruct Respondents as to the governing constitutional principles. For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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